Supreme Court, U.S.
FILED
FEB 20 1998
CLERK

(2)

No. 97-1200

In The

Supreme Court of the United States

October Term, 1997

JAMES C. WHERRY,

Petitioner,

vs.

IOWA SUPREME COURT BOARD OF PROFESSIONAL ETHICS AND CONDUCT,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Iowa

RESPONDENT'S BRIEF IN OPPOSITION

CHARLES L. HARRINGTON
Counsel of Record
521 East Locust St., Fl. 3rd
Des Moines, IA 50309-1939
(515) 243-0027
Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

32 pp

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether a limited restriction on lawyer advertising, designed to protect the public from misleading or potentially misleading lawyer advertisements, warrants review by this Court when viewed in light of the actual record made below.

2. Whether a reasonable restriction on lawyer advertising, which applies without distinction to all lawyers in the state, presents any issue of equal protection.

3. Whether Petitioner was denied due process when he was allowed a full and fair opportunity to present evidence and argue all federal constitutional issues before the state court.

4. Whether Petitioner's claim that he was denied due process by the state court's consideration of his receipt of a prior disciplinary admonition was preserved and has merit, where Petitioner failed to cite authority in the state proceedings and admitted the facts on which the prior admonition was based.

TABLE OF CONTENTS

Page

Counter Statement of Questions Presented i

Table of Authorities iii

Statement of the Case 1

Reasons for Denying the Writ 5

I. The Limited Restriction on Lawyer Advertising Imposed by the Iowa Rules is Permissible under the First Amendment and this Court's Decisions in Light of the Record Actually Made Below .. 5

II. The Disciplinary Rule Applies to All Lawyers in Iowa and Presents No Issue of Equal Protection 10

III. Petitioner Had a Full and Fair Opportunity to Present His Federal Constitutional Challenges for Resolution by the Iowa Supreme Court and Therefore Was Not Denied Due Process 13

IV. Petitioner's Due Process Challenge to the Iowa Court's Consideration of a Prior Admonition He Received for Similar Misconduct (Which He Admits Committing) Has Been Waived and is Without Merit 15

Conclusion 17

Appendices

DR 2-105 ..... A-1

Portions of Iowa Sup.Ct.R. 118..... A-7

Iowa R.App.P. 14(a)(3) A-10

TABLE OF AUTHORITIES

Page

CASES:

Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 819 (1977) 9

Board of Trustees of State University of New York v. Fox, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989) 8

Committee on Professional Ethics & Conduct v. Kaufman, 515 N.W.2d 28 (Iowa 1994) 14

Committee on Professional Ethics & Conduct v. Morris, 490 N.W.2d 806 (Iowa 1992) 6

Edenfield v. Fane, 507 U.S. 761, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) 9

Florida Bar v. Went For It., Inc., 515 U.S. 618, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995) 7, 9

In re R.M.J., 455 U.S. 191, 102 S.Ct. 929, 71 L.Ed.2d 64 (1982) 8, 9

Romer v. Evans, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) 11

United States v. Edge Broadcasting Co., 509 U.S. 418, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993) 7, 11

United States v. Watts, ___ U.S. ___, 117 S.Ct. 633, 136 L.Ed.2d 554 (1997) 16

CONSTITUTIONAL PROVISIONS:

U.S. CONST., amend. I 5, 10

U.S. CONST., amend. V 15

TABLE OF AUTHORITIES – Continued

Page

RULES:

Iowa Code of Professional Responsibility for Lawyers, DR 2-101(C) 12

Iowa Code of Professional Responsibility for Lawyers, DR 2-101(E) 12

Iowa Code of Professional Responsibility for Lawyers, DR 2-105 2

Iowa Code of Professional Responsibility for Lawyers, DR 2-105(A)(4) ..... *passim*

Iowa R.App.P. 14(a)(3) 2, 15

Iowa Sup.Ct.R. 118.2 ..... 2, 14

Iowa Sup.Ct.R. 118.5 ..... 2, 14

Iowa Sup.Ct.R. 118.10 ..... 2, 14

Iowa Sup.Ct.R. 118.11 ..... 2, 14

OTHER AUTHORITIES:

ABA Commission on Advertising *Lawyer Advertising at the Crossroads* (1995) 2, 3

Jim Rossi & Mollie Weighner, *An Empirical Examination of the Iowa Bar's Approach to Regulating Lawyer Advertising*, 77 Iowa L.Rev. 179, 248 (1991) 3

STATEMENT OF THE CASE

This case is about a lawyer who easily could have complied with a limited regulation designed to protect the public from being misled about the qualifications of lawyers who advertise practice in particular fields of law. Nothing in the record substantiates the claim that the rule at issue has harmed the public or the lawyers of Iowa or that the limited restriction in question is unduly burdensome. The reasonableness and constitutionality of the rule in question are shown by the record below. Petitioner has failed to present a compelling reason for review.

Respondent Iowa Supreme Court Board of Professional Ethics and Conduct ("Board") charged Petitioner with advertising his practice in certain areas of law without complying with Iowa Code of Professional Responsibility for Lawyers DR 2-105(A)(4). This disciplinary rule prescribes a minimum of experience (the greater of 200 hours or twenty percent of the lawyer's practice time must have been in the pertinent field in each of the two preceding calendar years) and training (at least ten hours of continuing legal education in the field during the preceding calendar year) before a lawyer may advertise practice in the field. The rule further requires that the advertising lawyer certify his or her eligibility in a report filed with the Continuing Legal Education Commission of the Supreme Court of Iowa. (The full text of the rule is set forth in Resp. A- 4-5.)

Petitioner had no continuing legal education in three of the areas he listed – domestic relations, wills, and social security appeals. And he admits he had drawn only

one or two wills prior to advertising his practice in that field.

The general factual background is summarized in the Iowa Supreme Court's opinion. (Pet. A- 2-3.) The Board will refer to further facts as necessary to address omissions or correct misstatements in Petitioner's statement of facts.

The version of the Iowa Code of Professional Responsibility for Lawyers in Appendix D of the Petition is not current in some respects. The present version of DR 2-105, which includes the provision at issue here, is set forth in the first appendix to this brief. Iowa Sup.Ct.R. 118.2, 118.5, 118.10, and 118.11, pertaining to disciplinary procedure, and Iowa R.App.P. 14(a)(3) are relevant to Petitioner's due process claims, and are included in the second and third appendices, respectively, to this brief.

Petitioner's characterization of Iowa's lawyer advertising rules as "abolitionist" (Pet. 8) is hyperbole. Iowa telephone directories contain page after page of lawyer advertisements.[1]

Nor does Iowa impose a *ban* on area of practice advertisements. Iowa has chosen the less restrictive approach of requiring lawyers to meet certain minimum

---

[1] Petitioner derived the term "abolitionist" from language in an American Bar Association study. In context, the only advertising said by that study to have been effectively "abolished" by the Iowa rules was electronic media advertising. *See* ABA Commission on Advertising *Lawyer Advertising at the Crossroads* 106 (1995). Iowa's rule governing electronic media advertising is not at issue here.

requirements before placing an advertisement that is misleading or potentially misleading to the public.

Contrary to Petitioner's assertion, nothing in the record supports his claims that the Iowa rule injures "[m]illions of citizens" and "tramples the rights of small businessmen and women." (Pet. 25.) The only evidence Petitioner cites for either of these assertions is two statistics: 1) over ten thousand lawyers are licensed to practice in Iowa and 2) less than ten percent have qualified and registered to advertise areas of practice. Petitioner overlooks other evidence, however, which belies the inferences he draws.

First, he fails to mention that only about half of those ten thousand lawyers are engaged in any private practice (either full or part time) within the state of Iowa. (App. below 70-71.) Lawyers not in private practice would have no reason to advertise. Second, the number of lawyers who are willing and able to qualify to advertise areas of practice has been increasing annually (from 96 in 1986 to 527 in 1996). (App. below 207.)

Especially significant in this regard is an American Bar Association report (which Petitioner himself offered in evidence below) showing that a substantial number of lawyers in Iowa simply do not want to advertise. ABA Commission on Advertising *Lawyer Advertising at the Crossroads* 59 (1995) (App. below 213). The ABA report in turn cited a study and survey, Jim Rossi & Mollie Weighner, *An Empirical Examination of the Iowa Bar's Approach to Regulating Lawyer Advertising*, 77 Iowa L. Rev. 179, 248 (1991), which found that a majority of Iowa lawyers would not advertise even if convinced that

advertising would increase the volume of their legal business. The same law review study showed that only about twenty-five percent of lawyers surveyed in Iowa thought that lawyer advertising was in the best interests of the public and less than twenty percent believed it was in the best interests of the legal profession. *Id.* at 247-48. These attitudes, rather than "burdensome" ethical restrictions, explain why a majority of Iowa lawyers limit their advertising.

There is no reason to believe that lawyers who *want* to qualify to advertise areas of practice are unable to do so. Petitioner has not identified a single Iowa lawyer, other than himself, who supposedly desires to advertise areas of practice but is unable legitimately to do so because of a difficulty in complying with DR 2-105(A)(4).

Moreover, Petitioner overlooks that he himself has met the practice and educational criteria for advertising "bankruptcy" since at least 1994, but has chosen not to file the necessary report with the continuing legal education commission. Petitioner conceded at the hearing below that the filing of such a report would not be unduly burdensome. (App. below 111.)

The Iowa Supreme Court found that Petitioner's advertisements were actually misleading. (Opinion, Pet. A-9.) Petitioner inaccurately claims this finding is contrary to the Board's position below. The Board's position both below and here is that Petitioner's ads were not *false*; the Board consistently has argued that the ads are at least potentially *misleading*.

Further corrections and additions to Petitioner's statement of facts are set forth as necessary in the following statement of reasons for denying the writ.

REASONS FOR DENYING THE WRIT

I. THE LIMITED RESTRICTION ON LAWYER ADVERTISING IMPOSED BY THE IOWA RULE IS PERMISSIBLE UNDER THE FIRST AMENDMENT AND THIS COURT'S DECISIONS IN LIGHT OF THE RECORD ACTUALLY MADE BELOW.

The Iowa court's decision rests not on disregard of prior holdings of this Court but on the record made below, significant portions of which Petitioner omits to mention. There is no compelling reason for this Court to review the Iowa court's decision.

1. Petitioner claims "[t]his Court should decide whether truthful and readily verifiable statements about the most basic element of attorney advertising – fields of practice – can be severely and unreasonably restricted, or whether such restrictions violate the first amendment." (Pet. 16.) This statement of the issue presents no "issue" at all. It is well settled that an unreasonable restriction on commercial speech is unconstitutional. The record here, however, shows that the restriction at issue is a reasonable fit with the articulated interest of protecting the public interest in informed – as opposed to misinformed – selection of legal representation. (Opinion, Pet. A- 6-8.)

2. Petitioner inaccurately claims the Board offered no evidence to support the substantial interest identified in the Iowa court's decision. (Pet. 7-8, 20.) To the contrary,

the Board presented evidence that advertisements listing practice in areas of the law are misleading or at least potentially misleading, thereby warranting regulation. In 1988 the Iowa Supreme Court reviewed and amended its lawyer advertising rules. As part of that review a special master heard evidence and made findings which the Board offered at Petitioner's hearing below. The special master found that consumers, in relying on an attorney's listing of fields of practice, assume the attorney has additional education and expertise in the advertised fields. (App. below 165-66) (Opinion, Pet.A- 8-9). Consequently, "the type of information the public finds most useful in the choice of a lawyer could, in fact, lead them astray in certain instances." (App. below 166-67.) Petitioner presented no evidence to rebut these findings.

The danger that the public will be misled by advertisements listing fields of practice is not merely hypothetical. It is shown by *Committee on Professional Ethics & Conduct v. Morris*, 490 N.W.2d 806 (Iowa 1992). *Morris* involved a lawyer who specified "immigration law" in his yellow-page advertisement. A Canadian citizen relied on this listing of practice to select Morris to represent her in obtaining lawful employment in the United States. Morris, however, had little experience in immigration law, had not met the eligibility requirements of DR 2-105(A)(4), and failed to take the necessary steps to protect her interests. As a result, she was arrested while on the job by immigration authorities and forced to "voluntarily" leave the country in lieu of deportation. *Id.* at 807.

3. The Iowa rule directly and materially advances the interest it seeks to protect. Compliance with the rule

ensures that a lawyer who advertises practice in a particular area has actual experience and current training in that area.

It is unnecessary for the Board to prove that the relevant state interest is directly advanced *as applied to Petitioner.* The question is whether the rule serves the general governmental interest sought to be advanced. *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 427-29, 113 S.Ct. 2696, 2704, 125 L.Ed.2d 345, 355-56 (1993). Here, however, Petitioner had little experience and continuing education in most of the areas he advertised. As the Iowa court found, his advertisements therefore were misleading. (Opinion, Pet. A-9.)

4. Petitioner fails to show why this Court should review the Iowa court's determination that DR 2-105(A)(4) is reasonably and narrowly drawn. He begins by making a facile comparison between the thirty-day waiting period upheld in *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995), and the two-year waiting period of DR 2-105(A)(4). He argues the Iowa rule is not narrowly drawn because it requires a waiting period that "is twenty-four times the length of the ban in [*Florida Bar*]." (Pet. 22).

This argument overlooks the obvious differences in purpose between DR 2-105(A)(4) and the rule upheld in *Florida Bar*, which banned targeted direct mail solicitation of accident victims and their relatives for thirty days. *Id.* at 620-21, 115 S.Ct. at 2374, 132 L.Ed.2d at 547. The Iowa court concluded, and reasonably so, that lawyers do not acquire special expertise overnight in a particular area of the law. Common sense alone dictates that the experience

and expertise of one who recently graduated from law school is unlikely to exceed that of the average lawyer.

Petitioner further contends DR 2-105(A)(4) is not reasonably drawn because the state has less restrictive alternatives available. A restriction on commercial speech, however, need not be a perfect fit, the best disposition, or the least restrictive means of protecting a governmental interest. *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 480, 109 S.Ct. 3028, 3034-35, 106 L.Ed.2d 388, 403-04 (1989).

Some of the alternatives Petitioner suggests (for example, passing a competency test in an area of the law) may well be more onerous than the requirements of DR 2-105(A)(4). Another option – use of disclaimers – is more reasonably viewed as a complement than as an alternative. Though disclaimers are helpful, they are not a cure-all. Evidence offered below from the review of Iowa's advertising rules conducted in 1988 shows that while most consumers find disclaimers understandable, many consumers do not bother to read them. (App. below 107). Disclaimers alone cannot be said to eliminate the potential for misinformation in the selection of counsel.

5. Petitioner contends the decision below is contrary to *In re R.M.J.*, 455 U.S. 191, 102 S.Ct. 929, 71 L.Ed.2d 64 (1982). The Iowa court correctly concluded that Petitioner's reliance on *R.M.J.* is misplaced because the rule in that case precluded advertising fields of practice in any language other than specified by the rule, while the Iowa rule imposes no such absolute ban: "Iowa lawyers, after meeting the eligibility requirements, are free to advertise

within reasonable limits." (Opinion, Pet. A-10) (citation omitted).

6. Petitioner claims the Iowa court misread this Court's decision in *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 115 S.Ct. 2371, 133 L.Ed.2d 541 (1995), apparently on the ground that the Iowa court and other state courts "may see *Went For It* as a complete reversal of the attorney advertising cases that began with *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977)." (Pet. 10.) No person or court, to the Board's knowledge, has interpreted *Florida Bar* as a "complete reversal" of this Court's lawyer advertising jurisprudence. Certainly nothing in the opinion and judgment below suggests that the Iowa Supreme Court so interpreted *Florida Bar*. Rather, the Iowa court began its opinion by expressing deference to *Bates*. (Pet. A-2.)

7. Petitioner notes a "concern" over a "disjuncture between regular commercial free speech cases and the attorney advertising cases." (Pet. 10-11.) Such a "disjuncture" raises no important question that demands resolution. This Court consistently has recognized that advertising by the learned professions and particularly by the legal profession raises concerns not present in other commercial speech cases. *E.g., Edenfield v. Fane*, 507 U.S. 761, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) (distinguishing CPAs from lawyers); *In re R.M.J.*, 455 U.S. 191, 202, 102 S.Ct. 929, 937, 71 L.Ed.2d 64, 73 (1982) (public's comparative lack of knowledge, limited ability of professions to police themselves, and absence of "product" standardization make advertising for professional services especially susceptible to abuses that states have legitimate interest in controlling). Petitioner fails to

explain why this well-recognized distinction is troubling or merits the Court's review at this time.

In sum, Petitioner's First Amendment analysis rests largely on a disregard of the record in support of the Iowa rule and presents no reason for this Court to review the opinion and judgment below.

II. THE DISCIPLINARY RULE APPLIES TO ALL LAWYERS IN IOWA AND PRESENTS NO ISSUE OF EQUAL PROTECTION.

Petitioner has raised two equal protection challenges to the Iowa rule governing advertisement of areas of practice. (Pet. 11-16, 26-28). Both challenges stand and fall on the misconception that the Iowa rule fails to treat similarly situated persons alike.

1. This case presents no issue of equal protection. The Iowa rule applies to all lawyers and does not discriminate among those similarly situated. Any lawyer may advertise practice in various areas, after meeting the same eligibility requirements that apply to all other lawyers in the state.

Petitioner's contention appears to be that DR 2-105(A)(4) creates two classes of lawyers: those who meet the eligibility requirements ("[s]easoned attorneys with years of experience in a particular field of law") (Pet. 27) and those (especially recent law school graduates) who do not. *All* lawyers, however, are recent law school graduates at the outset of their careers. *All* (including all recent graduates) are subject to the eligibility requirements before advertising areas of practice.

2. In claiming that this case implicates equal protection concerns, Petitioner relies on *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) (striking down as a denial of equal protection a state constitutional amendment banning ordinances protecting homosexuals). (Pet. 10, 15-16.) Petitioner baldly asserts that "[t]he Iowa State Supreme Court's decision in the present case is contrary to the careful reasoning in *Romer*." (Pet. 16.) The offending provision in *Romer* – unlike the advertising rule here – raised "the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* at ___, 116 S.Ct. at 1628, 134 L.Ed.2d at 867. No one can reasonably claim that DR 2-105(A)(4) is the result of animosity toward lawyers on the part of the Iowa Supreme Court. *Romer* offers no reason for extending rational basis or strict scrutiny analysis to the limited regulation of commercial speech involved here.

3. Even if the Iowa rule distinguishes between those similarly situated, Petitioner has failed to show that the rule is irrational. His argument boils down to the claim that it contains loopholes. While the rule may not wholly solve the problem it was designed to address, this does not make the rule invalid. *See United States v. Edge Broadcasting Co.* 509 U.S. 418, 434, 113 S.Ct. 2696, 2707, 125 L.Ed.2d 345, 360 (1993) (noting that ban on broadcast advertising of cigarettes is constitutional, even though such ban does not work to "keep the public wholly ignorant of the availability of cigarettes").

Moreover, the Iowa rules do not contain all the loopholes Petitioner asserts. He claims that the rules contain "inconsistencies" because, though he cannot directly say

he practices in bankruptcy or other areas, he can advertise his fees for those areas. (Pet. 12-13.) This claim is misleading. The fees which may be advertised under the Iowa rules come from a list of relatively simple, standardized services, including *uncontested* dissolutions of marriage, *simple* residential deeds, and *uncontested* personal bankruptcies. Iowa Code of Professional Responsibility for Lawyers DR 2-101(E) (Pet. D- 41-42). Because the terminology itself suggests the uncomplicated nature of the services, a consumer would be unlikely to conclude that the advertising lawyer has special expertise beyond that of other lawyers.

Though Petitioner is correct that the Iowa rules allow advertisements to mention membership in professional organizations which may suggest particular areas of the law (Pet. 12), the attorney who so advertises must include within the advertisement itself a separate disclaimer in addition to the one required by DR 2-105(A)(4). *See* Iowa Code of Professional Responsibility for Lawyers DR 2-101(C) (requiring disclaimer: "Membership and offices in legal fraternities and legal societies . . . and societies of law or field of practice does not mean that a lawyer is a specialist or expert in a field of law, nor does it mean that such lawyer is necessarily any more expert or competent than any other lawyer.") (Pet. D- 39-40).

As for another alleged inconsistency, Petitioner is incorrect in claiming he can circumvent DR 2-105(A)(4) by advertising "he is admitted to practice in certain specialized courts such as the bankruptcy court." (Pet. 13.) There is no admission to bankruptcy court as such. Any attorney licensed in federal district court is eligible to practice in the field of bankruptcy. (App. below 85.) It

would be at least potentially misleading for an advertisement to imply that an attorney has met some further qualification for practice in bankruptcy court.

In short, the Iowa rule presents no issue of equal protection for the Court to review and, while not perfect, is not "replete" with inconsistencies as Petitioner claims.

III. PETITIONER HAD A FULL AND FAIR OPPORTUNITY TO PRESENT HIS FEDERAL CONSTITUTIONAL CHALLENGES FOR RESOLUTION BY THE IOWA SUPREME COURT AND THEREFORE WAS NOT DENIED DUE PROCESS.

This issue does not merit review, as it results from Petitioner's misperception of the facts and the grievance procedure in Iowa. Petitioner's claim is that he was denied a full and fair opportunity to present his constitutional arguments below because, he says, the Board "never did consider [his] constitutional challenges" and because the hearing panel (the grievance commission) believed it was not authorized to determine the constitutionality of DR 2-105(A)(4). (Pet. 28-29.) Petitioner does not deny that the Iowa Supreme Court itself considered and resolved his constitutional challenges to the advertising restriction.

1. Petitioner is only partly correct in asserting that "[t]he Board never did consider the Petitioner's constitutional challenges" and "never conducted a hearing on these challenges prior to filing its complaint before the Grievance Commission." (Pet. 29.) It is true that the Board (which did consider and reject the constitutional

claims) determined to file formal charges against Petitioner without first affording him the opportunity to appear at a hearing. Such a hearing, however, is not required by due process. The Board's role in these proceedings is that of prosecutor. *See* Iowa Supreme Court Rule 118.2. and 118.5. (Resp. A- 7.) The Board is unaware of any authority – and Petitioner does not cite any – requiring a prosecutorial entity to conduct a hearing before presenting charges.

2. Petitioner is correct that the hearing panel (grievance commission) failed to address the merits of the constitutional challenges. This failure, however, in no way presents a due process issue. Under Iowa procedure, the grievance commission would not have resolved the constitutional issues in any event. *See Committee on Professional Ethics & Conduct v. Kaufman*, 515 N.W.2d 28, 30 (Iowa 1994) (in its de novo review, state supreme court independently determines matter and is not bound by commission's findings). *See* Iowa Sup.Ct.R. 118.10 and 118.11. (Resp. A- 8-9.)

3. Petitioner does not deny he had a full opportunity to make a *record* before the commission regarding the constitutional issues, and that record was available to the Iowa Supreme Court. *See* Iowa Supreme Court Rule 118.10 (entire record before commission is transmitted to court for de novo review). (Resp. A- 8.) Petitioner was able to brief and argue his constitutional challenges to the Iowa court and the court in fact considered (and rejected) them.

Petitioner's first due process argument is frivolous.

IV. PETITIONER'S DUE PROCESS CHALLENGE TO THE IOWA COURT'S CONSIDERATION OF A PRIOR ADMONITION HE RECEIVED FOR SIMILAR MISCONDUCT (WHICH HE ADMITS COMMITTING) HAS BEEN WAIVED AND IS WITHOUT MERIT.

Petitioner contends his right of due process has been violated by the Iowa court's consideration, in imposing a sanction in this proceeding, of an admonition he received for a previous violation of DR 2-105(A)(4). This issue does not warrant review because it was waived below by Petitioner and in any event has no merit.

1. Petitioner claimed in his appellate brief to the Iowa Supreme Court that consideration of the prior admonition would violate due process under the Fifth Amendment, but cited no authority in his brief for that claim. Under Iowa appellate procedure the issue therefore may be considered waived. Iowa R.App.P. 14(a)(3) ("Failure in the brief to state, to argue or to cite authority in support of an issue may be deemed waiver of that issue.") (Resp. A- 10). It appears this is how the Iowa court treated the issue, as its opinion contains no mention of it. The Board respectfully submits that this Court should not be a court of first hearing for an issue Petitioner failed to properly present below.

2. Even if Petitioner's claim is not waived, it would not merit review. The admonition imposed in 1992 was for the same kind of advertising violations implicated here. Petitioner does not deny the conduct on which the admonition was based. He in fact admits that he listed "bankruptcy" in an advertisement in 1992 and that he has never filed an eligibility report with the Iowa continuing

legal education commission.[2] (App. below 86, 113-14, 132-33.)

The situation here is similar to a sentencing court's consideration of a criminal defendant's commission of other, related conduct of which he or she has not been convicted. Such other conduct may properly be considered if the facts before the court show the defendant committed it. *See United States v. Watts*, ___ U.S. ___, 117 S.Ct. 633, 638, 136 L.Ed.2d 554, 565 (1997) (court may consider conduct of which defendants had been acquitted where evidence showed defendants in fact had committed such crimes). Here, any doubts about the propriety of the Iowa court's consideration of the prior admonition are resolved by Petitioner's admission of the conduct on which the admonition was based.

Petitioner has failed to present an arguable claim of denial of due process for this Court's review.

---

[2] When the admonition was issued, Respondent took exception thereto not because he was denying the facts but because he challenged the constitutionality of DR 2-105(A)(4). (App. below 105).

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES L. HARRINGTON
521 East Locust St., Fl. 3d
Des Moines, Iowa 50309-1939
(515) 243-0027
Counsel for Respondent

[Iowa Code of Professional Responsibility
for Lawyers DR 2-105]

DR 2-105 Description and Limitation of Practice.

(A) A lawyer may be identified as practicing in or limiting practice to certain fields of law as follows:

(1) A lawyer admitted to practice before the United States Patent and Trademark Office may use the designation "Patents", "Patent Attorney", "Patent Lawyer", or "Registered Patent Attorney" or any combination of those terms, on the lawyer's professional card, letterhead, office sign, professional notice or announcement, all as otherwise allowed by DR 2-102(A), and in newspapers, periodicals, telephone directory listings, and legal directories, as otherwise allowed by DR 2-101(B).

In addition to use of the designation "Patents", "Patent Attorney", "Patent Lawyer", and "Registered Patent Attorney", a lawyer admitted to practice before the United States Patent and Trademark Office may use the designation "Trademarks", "Trademarks and Copyright Law", "Trademark Attorney", "Trademark Lawyer", or any combination of those terms on the lawyer's professional card, letterhead, office sign, and professional notice or announcement, all as otherwise allowed by DR 2-102(A), and in newspapers, periodicals, telephone directory listings, and legal directories as otherwise allowed by DR 2-101(B), provided the lawyer satisfies the eligibility requirements of DR 2-105(A)(4) in any one of the fields of practice of "Patents", "Trademarks", or "Copyright Law" or combination thereof.

(2) An individual lawyer who, in fact, limits practice to certain fields of law or who is limiting practice

primarily to certain fields of law, and who satisfies the eligibility requirements of DR 2-105(A)(4), may indicate such limitation or description of practice by listing, in the manner provided by DR 2-105(A)(3), not more than three of the following fields of law practice in any communication otherwise allowed by DR 2-102(A) and DR 2-101(B):

Administrative Law
Admiralty Law
Adoption Law
Alternate Dispute Resolution
Antitrust and Trade Regulation
Appeals
Banking
Commercial and Retail Collections
Constitutional Law
Construction Law
Corporation and Business Law
Criminal Law
Debt and Bankruptcy Law
Discrimination and Civil Rights Law
Domestic Relations and Family Law
Employment Law
Environmental Law
Health Law
Immigration Law
Insurance Law
International and Foreign Law
International Trade and Investment
Labor Law
Malpractice or Professional Negligence
Military Law
Municipal Law
Pension and Profit Sharing Law
Personal Injury Law
Product Liability Law
Public Utility Law

Real Estate Law
Securities Law
Social Security Disability
Taxation Law
Trademarks and Copyright Law
Trial Law
Wills, Estate, and Probate Law
Workers' Compensation Law.

The Iowa Supreme Court Board of Professional Ethics and Conduct, acting as commissioners of the supreme court as provided by court rule 118, on its own motion or upon the request of a lawyer admitted to practice in this state, shall, from time to time, consider and recommend to the court proposed amendments to these rules expanding or restricting the permitted list of fields of law practice.

(3) Description or indication of limitation of practice permitted by DR 2-105(A)(2) shall be only in the following manner.

(a) If the lawyer accepts only legal matters in that lawyer's listed fields of law practice, such listing of fields of law practice shall be preceded by the words "practice limited to. . . . "

(b) If the lawyer is practicing primarily in that lawyer's listed fields of law practice, but also accepts other types of legal matters, such listing of fields of law practice shall be preceded by the words "practicing primarily in. . . . "

(c) In the case of a description or indication of limitation of practice communicated to the public in the classified section of telephone directories, newspapers, periodicals, or legal directories, there shall be contained within such

communication, or prominently displayed on the same page of such communication, and contained in any electronic media communication the disclosure required under DR 2-101(A) and also a "Notice to the Public" in the following form:

"A description or indication of limitation of practice does not mean that any agency or board has certified such lawyer as a specialist or expert in an indicated field of law practice, nor does it mean that such lawyer is necessarily any more expert or competent than any other lawyer.

All potential clients are urged to make their own independent investigation and evaluation of any lawyer being considered. This notice is required by rule of the Supreme Court of Iowa."

In the case of a description or indication of limitation of practice communicated to the public in the classified section of telephone directories, a lawyer shall not permit that lawyer's name to be listed under a heading or classification other than "Attorneys" or "Lawyers," except as provided in DR 2-101(B)(2)(b).

(4) Prior to communication of a description or indication of practice permitted by DR 2-105(A)(2) a lawyer shall report the lawyer's compliance with the following eligibility requirements each year in the written report required to be submitted to the Commission on Continuing Legal Education:

(a) The lawyer must have devoted the greater of 200 hours or 20 percent of the lawyer's time spent in actual law practice to each

separate indicated field of practice for each of the last two calendar years; and

(b) The lawyer must have completed at least ten hours of accredited continuing legal education courses of study in each separate indicated field of practice during the preceding calendar year.

The first report of compliance may be made in 1979. In reporting compliance with subsection (a), a statement of compliance is sufficient. In reporting compliance with subsection (b), the lawyer shall identify the specific courses and hours which apply to each indicated field of practice. Contents of the portion of the report required by this rule shall be public information.

(B) If advertising uses the term general practice, the lawyer may not list areas of practice under DR 2-105 preceded by the words "practice limited to. . . . " The term general practice may be used if the listing of areas of practice is preceded by the words "practicing primarily in. . . . "

(C) The nature of one's professional practice, or the types of cases or matters handled, may not be described other than as permitted by DR 2-105 and DR 2-101(E).

(D) If, due to hardship or extenuating circumstances, a lawyer is unable to complete the hours of accredited continuing legal education during the preceding calendar year as required by DR 2-105(A)(4)(b), the lawyer may apply to the commission on continuing legal education for an extension of time in which to complete the hours. No extension of time shall be granted unless

written application therefor shall be made on forms prescribed by the commission. Extensions of time within which to fulfill the minimum educational requirements may, in individual cases involving hardship or extenuating circumstances, be granted by the commission for a period not to exceed six months immediately following expiration of the year in which the requirements were not met.

[Portions of Iowa Supreme Court Rule 118]

Court Rule 118.2. Processing of complaints. There is hereby created the Iowa Supreme Court Board of Professional Ethics and Conduct. The board shall consist of seven lawyers and two laypersons appointed by the supreme court. * * * The board members are appointed commissioners of this court to initiate or receive, and process complaints against any attorney licensed to practice law in this state for alleged violations of the Iowa Code of Professional Responsibility for Lawyers and laws of the United States or the state of Iowa. Upon completion of any such investigation the Board of Professional Ethics and Conduct shall either dismiss the complaint made, or admonish or reprimand the attorney, or file and prosecute the complaint before the grievance commission or any division thereof. * * *

* * *

Court Rule 118.5. Complaints. Every complaint filed against an attorney with the grievance commission shall be signed and sworn to by the chair of the Board of Professional Ethics and Conduct and served upon the attorney concerned as provided by the rules of the grievance commission. Such complaints shall be sufficiently clear and specific in their charges to reasonably inform the attorney against whom the complaint is made of the misconduct alleged to have been committed. All complaints, motions, pleadings, records, reports, exhibits, evidence and all other documents or things filed under this rule or received in evidence in a hearing before the grievance commission shall be filed with and preserved by the clerk of the grievance commission in Des Moines, Iowa,

all of which shall at all times be available to this court or anyone designated by this court.

* * *

Court Rule 118.10. Disposition by the supreme court. Any report filed by the grievance commission with this court shall be served upon the attorney concerned as provided by the rules of the grievance commission. Such report shall be entitled in the name of the complainant versus the accused attorney as the respondent. Within fourteen days after a report is filed with the clerk of this court, the clerk of the grievance commission shall transmit to the clerk of this court the entire record made before the commission. If no appeal is taken or application for permission to appeal is filed within ten days as provided in court rule 118.11, the court shall proceed to review de novo the record made before the commission and determine the matter without oral argument or further notice to the parties. Upon such review de novo the court may impose a lesser or greater sanction than the discipline recommended by the grievance commission.

This court may revoke or suspend the license of an attorney admitted to practice in Iowa upon any of the following grounds: conviction of a felony, conviction of a misdemeanor involving moral turpitude, violation of any provision of the Iowa Code of Professional Responsibility for Lawyers, or any cause now or hereafter provided by statute or these rules.

Court Rule 118.11. Appeal. The respondent may appeal from the report filed by the grievance commission pursuant to rule 118.9 to this court. . . .

* * *

After the filing of a notice of appeal or the granting of permission to appeal, the appeal shall proceed pursuant to the Iowa Rules of Appellate Procedure to the full extent those rules are not inconsistent with this rule. * * * Review shall be de novo. If a respondent's appeal is dismissed for lack of prosecution pursuant to Iowa Rule of Appellate Procedure 19 or for any other reason, this court shall proceed to review and decide the matter pursuant to court rule 118.10 as if no appeal had been taken.

[Iowa Rule of Appellate Procedure 14(a)(3)]

Rule 14. Briefs.

a. *Appellant's brief.* The brief of appellant shall contain under appropriate headings and in the following order:

* * *

(3) A statement of the issues presented for review. Under each issue separately stated shall be a list of all cases, statutes and other authorities referred to in the argument covering that issue. The authorities which are considered to be the most pertinent and convincing shall be indicated by underlining. Not less than one nor more than four authorities under each separately stated issue shall be so indicated. Failure in the brief to state, to argue or to cite authority in support of an issue may be deemed waiver of that issue.